

Exhibit 3

The Jerome N. Frank Legal Services Organization

YALE LAW SCHOOL

December 16, 2011

Via Certified Mail

Associate General Counsel (General Law)
Department of Homeland Security
Washington, DC 20528

**RE: Freedom of Information Act Appeal
Determination by U.S. Immigration and Customs Enforcement
Reference No. 2012FOIA2544**

To Whom It May Concern:

This letter constitutes an appeal ("Appeal"), pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(a)(6)(A), and 6 C.F.R. § 5.9, concerning the decision of U.S. Immigration and Customs Enforcement ("ICE") on November 30, 2011, to deny a fee waiver to the American Immigration Council ("AIC") and the Connecticut chapter of the American Immigration Lawyers Association ("Connecticut AILA") in connection with their FOIA request dated November 29, 2011.

The underlying FOIA request sought all records related to the Criminal Alien Program ("CAP"), as well as to the series of ICE and Immigration and Naturalization Service ("INS") programs out of which CAP developed, including the INS Alien Criminal Apprehension Program, INS Institutional Hearing Program, INS/ICE Institutional Removal Program, and ICE National Criminal Alien Removal Plan. *See* Attachment A, Requesters' FOIA Request (November 29, 2011). Pursuant to the FOIA and DHS regulations, Requesters sought a fee waiver. *See id.* ICE's response denied that application. *See* Attachment B, ICE's Fee Waiver Denial (November 30, 2011). The Requesters appeal because ICE's denial of a fee waiver is contrary to the FOIA, DHS' regulations, and caselaw governing FOIA fee waiver requests. It is also arbitrary and capricious, an abuse of discretion, and unauthorized by law. The denial is utterly devoid of legal analysis or reasoned decision-making. This violates the intention of Congress that the "agency is obliged to explain its refusal to waive fees." *Samuel Gruber Educ. Project v. DOJ*, 24 F.Supp.2d 1, 11 (D.D.C.1998) (citing *National Treasury Employees Union v. Griffin*, 811 F.2d 644, 649 (D.C.Cir.1987)). "Absent such an explanation, the court cannot intelligently review the case and may properly order the agency to either grant the fee waiver or provide an explanation for the denial." *Judicial Watch, Inc. v. Gen. Services Admin.*, CIV.A. 98-2223(RMU), 2000 WL 35538030 at *4 (D.D.C. Sept. 25, 2000)

In its denial, ICE noted that the DHS regulation governing applications for fee waivers, 6 C.F.R. § 5.11(k), sets forth six factors to be considered in determining eligibility for a fee waiver:

- (1) Whether the subject of the requested records concerns "the operations or activities of the government;"
- (2) Whether the disclosure is "likely to contribute" to an understanding of government operations or activities;

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- (3) Whether disclosure of the requested information will contribute to the understanding of the public at large, as opposed to the individual understanding of the requestor or a narrow segment of interested persons;
- (4) Whether the contribution to public understanding of government operations or activities will be "significant;"
- (5) Whether the requester has a commercial interest that would be furthered by the requested disclosure; and
- (6) Whether the magnitude of any identified commercial interest to the requestor is sufficiently large in comparison with the public interest in disclosure, that disclosure is primarily in the commercial interest of the requestor.

Attachment B, ICE's Fee Waiver Denial at 1-2. ICE determined that Requesters failed to make a sufficient showing as to considerations (3) and (4), and denied the request for a fee waiver on that basis. *See id.* at 2. Requesters appeal this determination in its entirety and as applied to both Connecticut AILA and AIC. Requesters reiterate that both organizations satisfy all six considerations for the reasons set forth in their FOIA request. With regard to Connecticut AILA and to the four considerations not raised in the Fee Waiver Denial, requesters rely on their earlier letter. This appeal will therefore only introduce further evidence and reasoning as to why AIC satisfies considerations (3) and (4).

1. *Disclosure will contribute to public understanding of government operations or activities.*

As Requesters explained previously, disclosure of the requested material will contribute to "public understanding," as opposed to understanding of a narrow segment of interested persons. *See* Attachment A, Requesters' FOIA Request at 5. As set forth more fully in their FOIA request, AIC has the capacity, expertise, and intention to review, analyze and synthesize disclosed information and make it accessible to a broader public audience, including more than fifty thousand monthly visitors to AIC's website and the millions of visitors to other publicly accessible clearinghouses for public information. *See id.; Judicial Watch*, 2000 WL 35538030 at *8 (intent to post information to website is particularly indicative that information will be widely disseminated because "a web-site such as the plaintiff's can serve as an electronic clearinghouse of information which citizens would otherwise have to cull from a variety of disparate sources").

In addition to providing all disclosed information on its website, AIC plans to draft one or more summary reports of the records received in response to the FOIA request. AIC has the intent and capacity to disseminate the reports by posting them on the AIC website, which receives more than 58,000 monthly visitors; by distributing them to a mailing list of over 33,000 individuals; and by publishing them in the LAC newsletter, which is directly distributed to 12,000 recipients and available to the public on the AIC website. In 2010 alone, AIC issued 81 publications available to the general public on a wide range of issues related to immigration. *See* Attachment C, 2010 AIC Publications. Indeed, a core purpose of the Immigration Policy Center, a program of AIC, is to "provide[] policymakers, the media, and the *general public* with accurate information about the role of immigrants and immigration policy on U.S. society" through "widely disseminated" "reports and materials." *See* Immigration Policy Center: Mission, available at <http://www.immigrationpolicy.org/ipc-mission>. The suggestion that Requesters intend to use the requested records for "individual" rather than "public" understanding, 6 C.F.R. § 11(k)(2)(iii), ignores AIC's history and mission. *See Judicial Watch*, 2000 WL 35538030 at *8 (noting, in rejecting agency's denial of fee waiver under "public understanding"

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consideration, that requestor was “a non-profit organization whose stated business is publicizing potential governmental impropriety”). It is perhaps for that reason that U.S. Customs and Border Patrol (“CBP”), another component of DHS, was recently “persuaded that disclosure [to AIC would] contribute to the understanding of a reasonably broad audience of persons interested in immigration issues.” Attachment A, Requesters’ FOIA Request, Exhibit A, September 29, 2011 Letter from Customs and Border Control.

Indeed, even were AIC not able to point to such a clear track record and commitment to wide distribution of information, it would still satisfy the “public understanding” requirement of the fee waiver provision. Courts have emphasized that “[i]nformation need not actually reach a broad cross-section of the public in order to benefit the public at large.” *Carney v. Department of Justice*, 19 F.3d 807, 815 (2d Cir. 1994); *see also Manley v. Dep’t of Navy*, 1:07-CV-721, 2008 WL 4326448 (S.D. Ohio Sept. 22, 2008). Indeed, the legislative history of the FOIA makes it clear that “[a] request can qualify for a fee waiver even if the issue is not of interest to the public-at-large. Public understanding is enhanced when information is disclosed to the subset of the public most interested, concerned, or affected by a particular action or matter.” *Manley*, 2008 WL 4326448 at *6 (quoting 32 Cong. Rec. S14, 270-01 (daily ed. Sept. 30, 1986) (comments of Senator Leahy)). In *Carney*, the Second Circuit rejected as “not realistic” the notion that FOIA Requesters must “shoulder the formidable burden of demonstrating that any records released actually will be disseminated to a large cross-section of the public.” 19 F.3d at 814 (finding that doctoral student intending to publish “scholarly” articles satisfied “public understanding” requirement for fee waiver). AIC is, in fact, perfectly positioned to reach a broad cross-section of the public; but to qualify under the “public understanding” consideration it need only show that it will disseminate the information among those who are most concerned and interested in immigration issues, a showing Requesters have made.

2. *Disclosure of the requested information will contribute significantly to public understanding of CAP and its predecessors.*

As also set forth in the original FOIA request, the records will contribute significantly to public understanding of CAP and its predecessors. *See* Attachment A, Requesters’ FOIA Request at 6. As more fully explained in that request, CAP is one of the largest of ICE’s immigration enforcement initiatives, and yet is poorly understood even by the local governments who interact with it. *See id.* It is fair to say that the program is essentially invisible to the public at large. Therefore, “[t]he public’s understanding of the subject in question, as compared to the level of public understanding existing prior to the disclosure, [will] be enhanced by the disclosure to a significant extent.” 6 C.F.R. § 11(k)(2)(iv).

The core issue under this consideration is whether all or most of the information requested is already in the public domain. *See Carney*, 19 F.3d at 815; *Manley*, 2008 WL 4326448 at *7; *Judicial Watch*, 2000 WL 35538030 at *10. It is clear that a denial of a fee waiver on this basis is to be reserved for those exceptional cases in which records are “easily accessible and available to everyone.” *Durham v. DOJ*, 829 F.Supp. 428, 434-35 (D.D.C.1993).

The records at issue in this matter could not possibly be considered to be already in the public domain. CAP is ill-understood, has received minimal attention from either the media or advocacy groups, and there is remarkably little information that the agency has made publicly available about it.

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At the moment, an interested member of the public could easily locate only scant official materials on CAP: a single “fact sheet”¹ and one brief audit by the Office of the Inspector General². The Audit discusses only the program’s operations in four states, and goes into very little detail as to the structure, operations, or priorities of the program. Between the two documents, there are fewer than 20 pages of explanation of this massive program. Even a more exhaustive search would reveal little information. The ICE online “FOIA Library” contains two heavily redacted two-page memos regarding enforcement against criminal aliens. The Government Accountability Office has published only twelve reports on INS or ICE enforcement against criminal aliens, several of them written before CAP’s earliest predecessor program was created. Attachment D, List of GAO Reports on Criminal Alien Enforcement. Only two of those reports were written in the last decade. Furthermore, ICE, in its fee waiver denial, “never explained where in the ‘public domain’ [the requested] materials reside.” *Campbell v. U.S. Dept. of Justice*, 164 F.3d 20, 36 (D.C. Cir. 1998).

Indeed, the few independent public reports which have discussed CAP have largely raised preliminary concerns that the program is sweeping up non-violent individuals based on arrest for petty offenses, and may be facilitating increased racial profiling.³ While the OIG audit did not examine critically either the policy implications or unintended consequences of the program, the auditors did note that “CAP did not always record and retain critical information and documentation for its screening and identification activities.”⁴ However, while these “reports . . . highlight concerns” regarding CAP, they “do not [contain] the objective and substantive information underlying the administration and implementation of [CAP] in practice.” *Manley*, 2008 WL 4326448 at *7. That “objective and substantive” information – the policies, procedures, statistics, communications and other records regarding the actual operation of one of the largest components of the government’s immigration enforcement program – has largely been hidden from the public. There is therefore no doubt that the records sought by Requesters will significantly contribute to the public understanding of CAP and its predecessors.

¹ *Fact Sheet: Criminal Alien Program*, available at <http://www.ice.gov/news/library/factsheets/cap.htm>

² Office of Inspector General, *U.S. Immigration and Customs Enforcement Identification of Criminal Aliens in Federal and State Custody Eligible for Removal from the United States*, OIG-11-26, available at http://www.oig.dhs.gov/assets/Mgmt/OIG_11-26_Jan11.pdf

³ See Trevor Gardner II and Aarti Kohli, *The CAP Effect: Racial Profiling in the ICE Criminal Alien Program*, The Chief Justice Earl Warren Institute on Race, Ethnicity, & Diversity, Berkeley Law Center for Research and Administration, September 2009, available at: http://www.law.berkeley.edu/files/policybrief_irving_FINAL.pdf; American Immigration Council, *Special Report: The Criminal Alien Program – Immigration Enforcement in Travis County, Texas*, 2010, available at http://www.immigrationpolicy.org/sites/default/files/docs/Criminal_Alien_Program_021710.pdf.

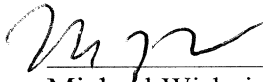
⁴ *U.S. Immigration and Customs Enforcement Identification of Criminal Aliens in Federal and State Custody Eligible for Removal from the United States* at 4.

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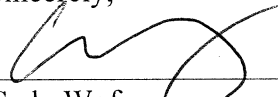
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For the reasons stated herein and in the original request, Requesters appeal ICE's decision. ICE denied Requesters' fee waiver request without cause, without more than conclusory justification, and contrary to Congress' intention that the FOIA fee waiver provision be "liberally construed in favor of waivers for noncommercial requesters." *Fed. CURE v. Lappin*, 602 F. Supp. 2d 197, 201 (D.D.C. 2009) (quoting *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir.1987)). Requesters respectfully ask that DHS grant their application for a fee waiver.



Michael Wishnie
Supervising Attorney

Sincerely,



Cody Wofsy
Josh Rosenthal
Law Student Interns

Attachment A

The Jerome N. Frank Legal Services Organization

YALE LAW SCHOOL

November 29, 2011

Via Certified Mail, Fax, and Email
U.S. Immigration and Customs Enforcement
Freedom of Information Act Office
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Washington, D.C. 20536-5009
Fax: (202) 732-0660
ICE-FOIA@dhs.gov

RE: Freedom of Information Act Request

To Whom It May Concern:

This letter constitutes a request under the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), on behalf of the American Immigration Council ("AIC") and the Connecticut chapter of the American Immigration Lawyers Association ("Connecticut AILA") (collectively, "Requestors").

The following requests are for records of U.S. Immigration and Customs Enforcement ("ICE") and its predecessor agency, the Immigration and Naturalization Service ("INS"), as well as any other related records which may be held elsewhere in the Department of Homeland Security ("DHS"). The Requestors seek to understand the development, operation, and implementation of the ICE Criminal Alien Program ("CAP"). We request all records¹ related to CAP, as well as to the series of INS and ICE programs out of which CAP developed, including the INS Alien Criminal Apprehension Program, INS Institutional Hearing Program, INS/ICE Institutional Removal Program, and ICE National Criminal Alien Removal Plan. We subsequently refer to these programs collectively as "CAP and its predecessors." These records include, but are not limited to:

I. Policies and Procedures

1. All records related to the development, implementation, and operation of CAP and its predecessors, including but not limited to:
 - a. Reports;
 - b. Memoranda;
 - c. Legal opinions;
 - d. Correspondence, including but not limited to intra-governmental correspondence;
 - e. Audits;
 - f. Policies, rules, orders, and any other sub-regulatory guidance.
2. In particular, but not limited to, all records described in request number 1 related to the following specific topics:

¹ The term "records" as used herein includes all records or communications preserved in electronic or written form, including but not limited to correspondence, documents, data, videotapes, audio tapes, e-mails, faxes, files, guidance, guidelines, evaluations, instructions, analyses, memoranda, agreements, notes, orders, policies, procedures, protocols, reports, rules, technical manuals, technical specifications, training manuals, or studies.

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- a. The creation, implementation, monitoring, or auditing of the incidence of racial profiling or policies to prevent it instituted by ICE, INS, or local law enforcement agencies in the course of the implementation and operation of CAP and its predecessors;
- b. Policies and procedures related to interviewing by ICE or INS agents under CAP and its predecessors, including but not limited to policies and procedures regarding advising interviewees of their rights, translation for non-native English speakers, wearing of official uniforms, provision of identification;
- c. Records, policies and procedures related to the issuance of civil immigration detainers (Form I-247) by CAP agents, including, but not limited to policies and procedures regarding CAP agent/team response protocols once the detainer is triggered and the individual is transferred to ICE custody.

II. Communication

1. All records of communication, whether electronic or conventional, to or from ICE or INS related to CAP and its predecessors, including but not limited to communications with:
 - a. Federal agencies or officials, including but not limited to personnel within ICE, DHS, or INS; other federal agencies or personnel within those agencies; Congress, members of Congress, or staff; and the White House;
 - b. State and local authorities, including but not limited to any state, city, county, or local police agency, department of corrections, sheriff's office, jail, or other holding facility;
 - c. Members of the press, non-governmental organizations, and members of the public.

III. Program Organization

1. All records regarding the internal structure of CAP and its predecessors, including but not limited to:
 - a. Organizational charts and other such diagrams or schematics;
 - b. Number, location, membership, and history of teams of ICE or INS enforcement agents constituted under CAP and its predecessors ("CAP Teams"), as well as the nature of officers' assignment to CAP Teams and supervision of CAP Teams;
 - c. Organizational and operational records regarding establishment, implementation and maintenance of telephonic call-in centers operated by CAP teams or agents to facilitate communication with state and local law enforcement agencies.
2. All records regarding the relationship of CAP and its predecessors to other government agencies or programs, including but not limited to all organizational charts and other such diagrams or schematics as well as any associated explanatory materials.
3. All records indicating the relationship between CAP and its predecessors and other ICE programs and activities, including but not limited to Enforcement and Removal Operations, Secure Communities, 287(g) arrangements, immigration detainers, and ICE Agreements of Cooperation in Communities to Enhance Safety and Security ("ICE ACCESS").

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4. All memoranda, policies, procedures, guidance, or other materials related to the connection between CAP and its predecessors and DHS administered databases, including but not limited to ENFORCE and IDENT.
5. All agreements, training materials, briefing, guidance, rules, and other records related to negotiation or cooperation with state and local law enforcement officials under CAP and its predecessors, including but not limited to
 - a. Records regarding the presence of ICE agents within state and local jails, prisons, or other sites of incarceration;
 - b. Records regarding the establishment or use of telephone or video conferencing capabilities between ICE and state and local jails, prisons, or other sites of incarceration;
 - c. All analyses and other records regarding changes or potential changes to state and local law enforcement agencies' policies, priorities, or actions related to CAP and its predecessors.
6. All records regarding contracts with private for-profit or not-for-profit organizations to implement part or all of CAP and its predecessors, including but not limited to Requests for Proposals, collected bids, contracts, criteria for choosing contractors, communication with contractors, and audits of contractors.

IV. Statistical Data and Resource Allocation

1. All statistical data and analysis regarding the identification, detention, arrest, and transfer to federal custody pursuant to or in connection with CAP and its predecessors, including, but not limited to, analysis of individuals' race, national origin, gender, age, criminal history, status of criminal cases, and immigration and removal history.
2. All statistical data regarding the volume, distribution, type, and result of contact between local law enforcement officials and ICE, including but not limited to communications directed to the Law Enforcement Support Center.
3. All statistical and other records detailing total ICE or INS expenditures, in both personnel time and financial resources, involved in developing and implementing CAP and its predecessors, including but not limited to all records of Congressional and/or DHS appropriations, budget requests, and analyses related to CAP and its predecessors.
4. All records detailing or referencing the relationship between CAP and its predecessors and the State Criminal Alien Assistance Program ("SCAAP").

V. Individual Records

1. All records regarding any individual identified by, detained by, arrested by, and/or transferred to the custody of ICE, INS, or any other federal agency pursuant to or in connection with CAP and its predecessors, including but not limited to Forms I-247 (Immigration Detainers), I-213 (Records of Deportable/Inadmissible Alien), I-286 (Notices of Custody Determination) and I-862 (Notices to Appear).²

² Requestors are prepared to negotiate the appropriate scope of these records, and are open to discussion of sampling as an appropriate means of producing individual records.

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2. All judicial and administrative complaints alleging unlawful or otherwise actionable conduct related to CAP and its predecessors, as well as the dispositions of any and all such complaints.

Requestors seek disclosure of all such records created from January 1, 1986 to the present. Requestors request that any records that exist in electronic form be provided in their native electronic format on a compact disc, digital video disk, or equivalent electronic medium. Requestors request that any documents stored in Portable Document Format ("PDFs") be provided as individual files in a searchable PDF format. Finally, Requestors request that reasonable metadata be transmitted along with files, including but not limited to maintaining parent-child relationships between emails and their attachments, author information, date and time stamp information. If any of the requested records or information are not kept in a succinct format, we request the opportunity to view the documents in your offices.

Requestors agree to pay search duplication and review fees of up to \$100.00. If the fees will amount to more than \$100.00, we request a fee waiver on the grounds that disclosure of the requested records is in the public interest. The disclosure of the records is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requestor. 5 U.S.C. §552(a)(4)(A)(iii); *see also* 6 C.F.R. § 5.11(k)(1).

DHS considers four factors set forth in 6 C.F.R. § 5.11(k)(2) when determining whether disclosure of the information is in the public interest:

- (1) "Whether the subject of the request concerns the 'operations or activities of the government,'"
- (2) "Whether the disclosure 'is likely to contribute' to an understanding of government operations or activities,"
- (3) "Whether disclosure of the requested information will contribute to 'public understanding'" as opposed to the individual understanding of the requestor or a narrow segment of interested persons; and
- (4) "Whether disclosure is likely to contribute 'significantly' to public understanding of government operations or activities."

This request satisfies all four factors. Indeed, U.S. Customs and Border Patrol ("CBP"), another component of DHS, recently granted a fee waiver for a similar request made by AIC for immigration-related records. *See* Exhibit A, September 29, 2011 Letter from Customs and Border Control. After a review of the above-listed factors, CBP concluded that "the public interested standard [was] satisfied and that the disclosure [was] not in the commercial interest of the requester, AIC." *Id.* at 8.

1. *The subject of the requested records concerns the operations and activities of the government.*

The requested records straightforwardly concern the operations or activities of the government. ICE is a component of DHS, a cabinet level department of the federal government. ICE is responsible, in part, for enforcement of the immigration law through identification, detention, and removal of non-citizens. The records Requestors seek relate to ICE's investigation and enforcement programs. Such

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programs are "operations and activities" of ICE.

2. Disclosure is likely to contribute to an understanding of government operations or activities.

The disclosure of the records requested is in the public interest because it will inform Requestors and the public at large about the organization and operations of CAP and its predecessors. CAP is currently one of the largest areas of cooperation between the federal government and state and local authorities in the area of immigration law and leads to a large proportion of annual immigration detentions and removals. The government's policies towards and the treatment of immigrants and suspected other non-citizens are of immense public concern at present and the disclosure of the requested records will help inform public debate about these issues.

Requestors are well situated to widely disburse information regarding CAP and its predecessors. The AIC's Immigration Policy Center (IPC) and Legal Action Center (LAC) reach out to lawyers and the general public to promote a better understanding of immigration law, policy and practice. The IPC researches issues related to immigration (such as the impact of immigration on the economy, jobs and crime), and regularly provides information to leaders on Capitol Hill and the media.³ The LAC works with other immigrants' rights organizations and immigration attorneys across the United States to advance the fair administration of immigration laws.⁴ Connecticut AILA is a nonprofit organization comprised of immigration attorneys who are members of the national organization American Immigration Lawyers Association.⁵ Connecticut AILA works at the state level to advocate for immigrants rights and educate the public regarding the administration of the immigration system in Connecticut.

3. Disclosure will contribute to public understanding of government operations or activities.

Disclosure of the requested information also will contribute to "public understanding," as opposed to understanding of a narrow segment of interested persons. Release of this information to AIC and Connecticut AILA will significantly advance the general public's understanding of CAP and ICE's enforcement practices more generally. AIC has the capacity, legal expertise, and intention to review, analyze and synthesize this information and make it accessible to a broader public audience. In addition to providing all released information on its website, AIC plans to draft one or more summary reports of the records received in response to the FOIA request. AIC has the intent and capacity to disseminate the reports by posting them on the AIC website, which contains immigration-related information and news and is accessible by any member of the public. AIC's website receives more than 58,000 monthly visitors, and information available on the website is shared and re-posted on other websites with large audiences, including Alternet, a website with 2.3 million monthly visitors. AIC also will distribute the summary reports to our mailing list of over 33,000 supporters and will publish them in the LAC newsletter, which is directly distributed to 12,000 recipients and available to the public on the AIC website. Finally, AIC has regular contact with national print and news media and plans to continue to share information about this process with interested media.

³ See <http://www.immigrationpolicy.org/>.

⁴ See <http://www.legalactioncenter.org/>.

⁵ See <http://www.ctaila.org/>.

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4. *Disclosure of the requested information will contribute significantly to public understanding of CAP and its predecessors.*

CAP and its predecessors are extremely important ICE enforcement programs. In Fiscal Year 2009, 48 percent of all deportable aliens that were identified by ICE were identified through CAP, leading the agency to request a record \$200 million for the program in FY 2010. Despite the size and importance of these programs, they are not well understood by advocates or the general public. *See, e.g., American Immigration Council, Special Report: The Criminal Alien Program – Immigration Enforcement in Travis County, Texas*, 2010 at p. 6 (“Despite its long history and widespread reach, CAP is not a well known program and confusion exists—even among [local governments] themselves—as to what participation in CAP entails”). The requested records will shed light on CAP’s organization and functioning, and will significantly contribute to the public’s understanding of the program.

Additionally, disclosure of the information requested is not in Requestors’ commercial interest. Any information disclosed by the Requestors as a result of this FOIA request will be available to the public at no cost and will be used to develop publicly available materials. Thus, a fee waiver would fulfill Congress’s legislative intent in amending FOIA. *See Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (“Congress amended FOIA to ensure that it be ‘liberally construed in favor of waivers for noncommercial requesters’”); OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2523, § 2 (Dec. 31, 2007) (finding that “disclosure, not secrecy is the dominant objective of the Act,” but that “in practice, the Freedom of Information Act has not always lived up to the ideals of that Act . . .”).

Requestors also request a waiver of search fees on the grounds that each Requestor qualifies as a “representative of the news media.” 6 C.F.R. §§ 5.11(b)(6). Accordingly, fees associated with the processing of the Request should be “limited to reasonable standard charges for document duplication.” 5 U.S.C. § 552(a)(4)(A)(ii)(III); *see also* 6 C.F.R. §§ 5.11(d)(1) (search fees shall not be charged to “representatives of the news media”).

AIC and Connecticut AILA meet the statutory and regulatory definitions of a representative of the news media because each is an “entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.” 5 U.S.C. § 552(a)(4)(A)(ii)(III); *see also Nat’l Sec. Archive v. Dep’t of Def.*, 880 F.2d 1381, 1387 (D.C. Cir. 1989); *ACLU v. Dep’t of Justice*, 321 F.Supp. 2d 24, 30 n. 5 (finding non-profit public interest group to be “primarily engaged in disseminating information”); *Elec. Privacy Info Ctr. v. Dep’t of Def.*, 241 F. Supp. 2d 5, 10-15 (D.D.C. 2003) (finding non-profit public interest group that disseminated an electronic newsletter and published books was a “representative of the media” for the purposes of FOIA).

The American Immigration Council’s mission is to “strengthen America by . . . shaping how Americans think about and act towards immigration now and in the future.”⁶ In furtherance of this mission, the Council publishes an array of fact sheets, newsletters, and other documents for public consumption. In 2010, AIC issued 74 such publications and over 270 blog posts regarding immigration

⁶ *American Immigration Council: Mission*, available at <http://www.americanimmigrationcouncil.org/mission>.

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issues.⁷ Among those reports were *Giving Facts a Fighting Chance – Answers to the Toughest Immigration Questions*,⁸ *Raising the Floor for American Workers – The Economic Benefits of Comprehensive Immigration Reform*,⁹ *ICE's Enforcement Priorities and the Factors that Undermine Them*,¹⁰ and *The Secure Communities Program – Unanswered Questions and Continuing Concern*.¹¹ As the local chapter of the American Immigration Lawyers Association, Connecticut AILA provides a forum for discussion of important issues related to the immigration system, and acts as a platform to distribute that information to a wider audience. See, e.g., Rebecca Kidder, *Administrative Discretion Gone Awry: The Reintroduction of the Public Charge Exclusion for HIV-Positive Refugees and Asylees*, 106 Yale L.J. 389, 394 n. 34 (1996) (Citing comments of an INS district director delivered at a Connecticut AILA forum).


Finally, pursuant to the applicable regulations and statute, Requestors expect the determination of this request for documents within 20 days. See 5 U.S.C. 552(a)(6)(A)(i). If this request is denied in whole or in part, we ask that you justify all deletions by reference to specific exemptions to FOIA. Requestors expect the release of all segregable portions of otherwise exempt material. Requestors reserve the right to appeal a decision to withhold any information or to deny a waiver of fees.


Please furnish all applicable records to:

Michael Wishnie
Jerome N. Frank Legal Services Organization
P.O. Box 209090
New Haven, CT 06520-9090

Thank you for your assistance and prompt attention to this matter.

Sincerely,



Michael Wishnie
Supervising Attorney

Cody Wofsy
Josh Rosenthal
Law Student Interns

⁷ See AIC 2010 Annual Report, available at <http://www.americanimmigrationcouncil.org/sites/default/files/docs/council/AnnualReport2010.pdf>.

⁸ Available at http://www.immigrationpolicy.org/sites/default/files/docs/Giving_Facts_a_Fighting_Chance_100710.pdf.

⁹ Available at <http://www.immigrationpolicy.org/sites/default/files/docs/Hinojosa%20-%20Raising%20the%20Floor%20for%20American%20Workers%20010710.pdf>.

¹⁰ Available at http://www.immigrationpolicy.org/sites/default/files/docs/ICE_Enforcement_Priorities_110910.pdf.

¹¹ Available at http://www.immigrationpolicy.org/sites/default/files/docs/Secure_Communities_updated_110410.pdf.

Exhibit A

1300 Pennsylvania Avenue NW
Washington, DC 20229



**U.S. Customs and
Border Protection**

SEP 29 2011

DIS-3 OT:RR:RDL:FAPL
H170224 AML

Ms. Emily Creighton, Staff Attorney
American Immigration Council
1331 G Street, N.W., Suite 200
Washington, D.C. 20005-3141

RE: Freedom of Information Act Appeal; Request for information concerning the availability and role(s) of attorneys during noncitizen clients' interactions with CBP; Denial of Fee Waiver Request; CBP FOIA Division File No. 2011F08147

Dear Ms. Creighton:

This is in reply to your letter of May 26, 2011, with which you appeal, on behalf of your organization, the American Immigration Council (hereinafter "AIC"), the response you received from the Director, Freedom of Information Act (FOIA) Division, U.S. Customs and Border Protection (CBP) dated May 12, 2011 (FOIA Division File No. 2011F08147) to your FOIA request. Within the May 26, 2011 letter, you also note the appeal of the March 29, 2011 decision of the FOIA Division to deny your request for a fee waiver. You appeal the decision of the FOIA Division which directed you to what it determined to be "public information" in response to your original FOIA request and question the adequacy of the FOIA Division's search for responsive records.

On June 23, 2011, you confirmed in a telephone call with an attorney on my staff that your request for information regarding CBP policies, directives and guidance relating to the accessibility of counsel is limited to noncitizens' interactions with CBP in immigration encounters at ports of entry and between ports of entry, rather than the policies, directives and guidance concerning the permissible roles of attorneys in CBP's myriad trade matters.

In the initial FOIA request to CBP dated March 14, 2011, you requested all records from CBP which relate or refer to the following:

- Attorneys' ability to be present during their clients' interactions with CBP;
- What role attorneys may play during their clients' interactions with CBP;
- Attorney conduct during interactions with CBP on behalf of their clients;

- Attorney appearances at CBP offices or other facilities.¹²

In response to your request, the FOIA Division collected and reviewed responsive records and concluded that “much of the information you are seeking is already publicly available.” The FOIA Division stated that responsive information could be found in the Code of Federal Regulations (CFR), the Personal Search Handbook, and the Inspector’s Field Manual (IFM) (which, “once the IFM is approved for release,” will be available via the internet on the CBP Reading Library).

On appeal, you contend that “CBP did not conduct an adequate search for records responsive to our comprehensive request for guidance related to noncitizens’ access to counsel before CBP pursuant to 5 U.S.C. § 552(a)(3).” You elaborate that:

[Y]our request for “records” related to the role of counsel in CBP settings encompasses all records or communications preserved in electronic or written form, including but not limited to correspondence, documents,

¹ You explained via an itemized list in the initial request that the above records may include, but are not limited to:

- 1) Guidance or any information obtained by the agency regarding the circumstances under which an attorney may accompany a client during questioning in primary inspection, or what role the attorney may play during such questioning;
- 2) Guidance or any information obtained by the agency regarding the circumstances under which an attorney may accompany a client during questioning in secondary inspection, or what role the attorney may play during such questioning;
- 3) Guidance or any information obtained by the agency regarding the circumstances under which an attorney may accompany a client during questioning in deferred inspection, or what role the attorney may play during such questioning;
- 4) Guidance or any information obtained by the agency regarding the circumstances under which an attorney may accompany a client during questioning related to alleged abandonment of U.S. residence, or what role the attorney may play during such questioning;
- 5) Guidance or any information obtained by the agency regarding the circumstances under which an attorney may accompany a client during questioning related to alleged lack of proper immigration documents, or what role the attorney may play during such questioning;
- 6) Guidance or any information obtained by the agency regarding the circumstances under which an attorney may accompany a client during questioning related to the National Security Entry-Exit Registration System (NSEERS), or what role the attorney may play during such questioning;
- 7) Guidance or any information obtained by the agency regarding the circumstances under which an attorney may accompany a client during any other questioning by a CBP agent, or what role the attorney may play during such questioning;
- 8) Guidance or any information obtained by the agency regarding procedures for notification of attorneys with Form G-28 and/or EOIR-28 on file of CBP’s intention to question their clients;
- 9) Guidance or any information obtained by the agency regarding the circumstances under which an attorney may be involved in the CBP’s decision to return an unaccompanied alien child to Mexico without referring the child to ICE or HHS/ ORR/ Department of Unaccompanied Children;
- 10) Guidance or any information obtained by the agency regarding the circumstances under which an attorney may be involved in CBP’s decision to release an unaccompanied immigrant child to a responsible adult who is not a family member.

² With regard to your request for NSEERS information (see item # 6 in footnote 1 immediately above), we note that effective April 28, 2011, DHS will no longer register aliens under NSEERS. See Federal Register Volume 76, Number 82 (Thursday, April 28, 2011) at <http://www.gpo.gov/fdsys/pkg/FR-2011-04-28/html/2011-10305.htm>.

data, videotapes, audiotapes, e-mails, faxes, files, guidance, guidelines, evaluations, instructions, analyses, memoranda, agreements, notes, orders, policies, procedures, protocols, reports, rules, manuals, technical specifications, training materials, and studies. Given the varied circumstances in which noncitizens and their attorneys interact with CBP, it is very unlikely that the three documents referenced in your May 12, 2011, letter reflect a search reasonably calculated to uncover documents relevant to the role of counsel in CBP settings. We indicated in our FOIA request that the interactions among CBP officers, attorneys and their noncitizen clients take place in different settings such as secondary and deferred inspection. In addition, the reasons for the interview or interaction may vary significantly.

You conclude your contentions regarding this issue by stating that “the May 12, 2011, response merely includes general documents that are publicly available and does not reflect a search reasonably calculated to uncover documents relevant to the guidance outlined in the request.”

You “also appeal the denial of the fee waiver request and the commercial requester designation.” The March 29, 2011, FOIA Division letter denying the fee waiver request concludes that the request was “deficient” because disclosure of the information requested 1) “will not contribute to the understanding of the public at large but to the understanding of a narrow segment of interested person(s),” and 2) will not “contribute significantly to the public understanding of government operations or activities.” Thus, the letter determined that AIC “failed to satisfy each of the required factors” set forth at 6 C.F.R. § 5.11(k)(2) and denied the request for fee waiver.

Initially, we reconsider your request for fee waiver. You indicate that “AIC is a 501(c)(3), tax-exempt, not-for-profit educational, charitable organization . . . [that] seeks the requested information for the purpose of disseminating it to members of the public who access AIC’s website and other AIC publications, and not for the purpose of commercial gain.” You state that:

AIC is entitled to a waiver of all costs because disclosure of the information is “... likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii). See also 6 C.F.R. § 5.1(k).

You explain that:

Because there is no available comprehensive guidance governing attorney representation and conduct in interactions with CBP, the dissemination of these records will significantly inform public understanding of the scope of representation permitted before CBP.

The Department of Homeland Security (DHS) FOIA regulation which governs fee waivers, 6 CFR § 5.11(k), provides in relevant part that:

(k) Requirements for waiver or reduction of fees. (1) Records responsive to a request will be furnished without charge or at a charge reduced below that established under paragraph (c) of this section where a component determines, based on all available information, that the requester has demonstrated that:

(i) Disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government; and

(ii) Disclosure of the information is not primarily in the commercial interest of the requester.

The regulation then provides guidance about the factors to be considered in making a fee waiver determination.

(2) To determine whether the first fee waiver requirement is met, components will consider the following factors:

(i) The subject of the request: Whether the subject of the requested records concerns "the operations or activities of the government." The subject of the requested records must concern identifiable operations or activities of the federal government, with a connection that is direct and clear, not remote or attenuated.

(ii) The informative value of the information to be disclosed: Whether the disclosure is "likely to contribute" to an understanding of government operations or activities. The disclosable portions of the requested records must be meaningfully informative about government operations or activities in order to be "likely to contribute" to an increased public understanding of those operations or activities. ~~The disclosure of information that~~ already is in the public domain, in either a duplicative or a substantially identical form, would not be as likely to contribute to such understanding where nothing new would be added to the public's understanding.

(iii) The contribution to an understanding of the subject by the public likely to result from disclosure: Whether disclosure of the requested information will contribute to "public understanding." The disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as

opposed to the individual understanding of the requester. A requester's expertise in the subject area and ability and intention to effectively convey information to the public shall be considered. It shall be presumed that a representative of the news media will satisfy this consideration.

(iv) The significance of the contribution to public understanding: Whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities. The public's understanding of the subject in question, as compared to the level of public understanding existing prior to the disclosure, must be enhanced by the disclosure to a significant extent. Components shall not make value judgments about whether information that would contribute significantly to public understanding of the operations or activities of the government is "important" enough to be made public.

(3) To determine whether the second fee waiver requirement is met, components will consider the following factors:

(i) The existence and magnitude of a commercial interest: Whether the requester has a commercial interest that would be furthered by the requested disclosure. Components shall consider any commercial interest of the requester (with reference to the definition of "commercial use" in paragraph (b)(1) of this section), or of any person on whose behalf the requester may be acting, that would be furthered by the requested disclosure. Requesters shall be given an opportunity in the administrative process to provide explanatory information regarding this consideration.

(ii) The primary interest in disclosure: Whether any identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is "primarily in the commercial interest of the requester." A fee waiver or reduction is justified where the public interest standard is satisfied and that public interest is greater in magnitude than that of any identified commercial interest in disclosure. Components ordinarily shall presume that where a news media requester has satisfied the public interest standard, the public interest will be the interest primarily served by disclosure to that requester. Disclosure to data brokers or others who merely compile and market government information for direct economic return shall not be presumed to primarily serve the public interest.

In compliance with the regulation set forth above, we apply the factors set forth in 6 CFR § 5.11(k) to the contentions you make in support of your fee waiver request.

In support of the contention that disclosure of the information requested would be in the public interest, you state that:

AIC educates citizens about the enduring contributions of America's immigrants, supports sensible and humane immigration policies that reflect American values, and works to ensure that immigration laws are enacted and implemented in compliance with fundamental constitutional and human rights. The AIC's Immigration Policy Center (IPC) and Legal Action Center (LAC) help carry out this mission by reaching out to the general public to promote a better understanding of immigration law, policy and practice.

Therefore, we consider whether "disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government" and whether "disclosure of the information is not primarily in the commercial interest of the requester."

In order to make the "public interest" determination, the regulation requires consideration of (i) whether the subject of the requested records concerns "the operations or activities of the government"; (ii) whether the disclosure is "likely to contribute" to an understanding of government operations or activities; (iii) whether disclosure of the requested information will contribute to "public understanding"; and (iv) whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities.

In consideration of the first public interest factor, we conclude that the request for information regarding individual's access to attorneys during interactions with personnel at CBP ports of entry "concerns the operations or activities of the government." CBP is the federal agency charged with protecting the borders and enforcing the immigration and customs laws. Your request for certain information related to the agency's enforcement of the immigration laws, *i.e.*, whether travelers or immigrants will be permitted access to attorneys in their interactions with border enforcement personnel, is an inquiry regarding an operation and activity of the government.

In consideration of the second public interest factor, we conclude that the request for information regarding individual's access to attorneys during interactions with personnel at CBP ports of entry is "likely to contribute" to an understanding of government operations or activities. Immigration has been and continues to be a significant issue in the United States. The disclosure of non-exempt portions of the CBP policies, directives and guidance regarding immigrant access to attorneys during interactions at ports of entry is "likely to contribute" to an increased public understanding of those CBP operations or activities.

In consideration of the third public interest factor, we conclude that the disclosure of information regarding individual's access to attorneys during interactions with personnel at CBP ports of entry will contribute to "public understanding." Given your

representations that your organization has expertise in the subject area and the ability and intention to effectively disseminate the information to the public, we are persuaded that disclosure will contribute to the understanding of a reasonably broad audience of persons interested in immigration issues.

In consideration of the fourth public interest factor, we conclude that the disclosure is likely to contribute “significantly” to public understanding of government operations or activities. The public’s understanding of the subject in question, as compared to the level of public understanding existing prior to the disclosure, must be enhanced by the disclosure to a significant extent.

In *Manley v. Dep’t of the Navy*, 2008 U.S. Dist. LEXIS 111499, 22-24 (S.D. Ohio Sept. 19, 2008), the United States District Court for the Southern District of Ohio, in reversing the denial of a fee waiver request, held that:

The Navy’s argument is premised on the assumption that the information must be disseminated to the public-at-large before a waiver is appropriate. However, “[i]nformation need not actually reach a broad cross-section of the public in order to benefit the public at large.” *Carney v. Department of Justice*, 19 F.3d 807, 815 (2d Cir.), cert. denied, 513 U.S. 823, 115 S. Ct. 86, 130 L. Ed. 2d 38 (1994). See also *Judicial Watch, Inc. v. General Services Admin.*, 2000 U.S. Dist. LEXIS 22872, 2000 WL 35538030, *7 (D.D.C. 2000). Courts have rejected the narrow interpretation urged by the Navy in light of the legislative history of the FOIA which suggests a more focused group: “A request can qualify for a fee waiver even if the issue is not of interest to the public-at-large. Public understanding is enhanced when information is disclosed to the subset of the public most interested, concerned, or affected by a particular action or matter.” 32 Cong. Rec. S14,270-01 (daily ed. Sept. 30, 1986) (comments of Senator Leahy). For example, in *Carney v. Department of Justice*, 19 F.3d 807 (2d Cir.), cert. denied, 513 U.S. 823, 115 S. Ct. 86, 130 L. Ed. 2d 38 (1994), the Second Circuit rejected as “not realistic” the position that a requester was required to disseminate the information to “a large cross-section of the public.” *Id.* at 814. “The relevant inquiry . . . is whether the requester will disseminate the disclosed records to a reasonably broad audience of persons interested in the subject.” *Carney*, 19 F.3d at 815 (finding sufficiently “public” that a doctoral student in political science planned to publish a dissertation and write scholarly articles; while usually not reaching a general audience, the dissertation would enlighten interested scholars and be of great benefit to the public at large). Likewise, the court in *Community Legal Services, Inc. v. U.S. Dept. of Housing and Urban Development*, 405 F. Supp.2d 553 (E.D. Pa. 2005), determined that while the Legal Services work was unlikely to reach a very general audience, there was nevertheless a segment of the public interested in its work, to wit, a reasonably large segment of Philadelphia’s low- and moderate-income families. *Id.* at 556 -557. In other words, the relevant

issue is whether “the requester will disseminate the disclosed records to a reasonably broad *audience of persons interested in the subject*.” *Carney*, 19 F.3d at 815 (emphasis added [in original]). *Manley v. Dep’t of the Navy*, 2008 U.S. Dist. LEXIS 111499, 22-24 (S.D. Ohio Sept. 19, 2008).

We conclude based on the rationale set forth in *Manley* that there is sufficient public interest among the segment of the public with interest in immigration issues (“a reasonably broad audience of persons interested in the subject”) to satisfy the “public interest” factors set forth in the relevant DHS regulation.

With regard to whether AIC has a commercial interest in the disclosure of the information, we consider whether AIC has any commercial interest that would be furthered by the requested disclosure. Given that your organization is a non-profit organization and the stated purpose for requesting the information is to distribute and disseminate it via the internet and mailing lists without charge (for example, you state unequivocally in the appeal letter that “[l]ike all other reports and information available on the AIC website, information about counsel received in response to this FOIA request will be widely distributed to immigration attorneys, noncitizens and other interested members of the public free of charge.”), we are persuaded that AIC does not have a commercial interest that would be furthered by release of the information requested.

In light of the foregoing, we conclude that the public interest standard is satisfied and that the disclosure is not in the commercial interest of the requester, AIC. Therefore, the fee waiver pursuant to 6 CFR § 5.11(k) is justified and we reverse the decision of the FOIA Division to deny the request for fee waiver.

In consideration of your appeal, we note that the subject matter of the FOIA request – the availability and role(s) of attorneys during noncitizen clients’ interactions with government personnel at U.S. borders – is governed by statute and regulation.

8 U.S.C. § 1357 provides that:

(a) Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant-

(1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States;

(2) to arrest any alien who in his presence or view is entering or attempting to enter the United States in violation of any law or regulation made in pursuance of law regulating the admission, exclusion, expulsion, or removal of aliens, or to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained

for his arrest, but the alien arrested shall be taken without unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States;

(3) within a reasonable distance from any external boundary of the United States, to board and search for aliens any vessel within the territorial waters of the United States and any railway car, aircraft, conveyance, or vehicle, and within a distance of twenty-five miles from any such external boundary to have access to private lands, but not dwellings for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States;

8 U.S.C. § 287.3(c) provides:

(c) Notifications and information. Except in the case of an alien subject to the expedited removal provisions of section 235(b)(1)(A) of the Act, an alien arrested without warrant and placed in formal proceedings under section 238 or 240 of the Act will be advised of the reasons for his or her arrest and the right to be represented at no expense to the Government. The examining officer will provide the alien with a list of the available free legal services provided by organizations and attorneys qualified under 8 CFR part 1003 and organizations recognized under §292.2 of this chapter or 8 CFR 1292.2 that are located in the district where the hearing will be held. The examining officer shall note on Form I-862 that such a list was provided to the alien. The officer will also advise the alien that any statement made may be used against him or her in a subsequent proceeding.

8 CFR § 292.5, captioned "Service upon and action by attorney or representative of record" provides:

(b) Right to representation. Whenever an examination is provided for in this chapter, the person involved shall have the right to be represented by an attorney or representative who shall be permitted to examine or cross-examine such person and witnesses, to introduce evidence, to make objections which shall be stated succinctly and entered on the record, and to submit briefs. **Provided, that nothing in this paragraph shall be construed to provide any applicant for admission in either primary or secondary inspection the right to representation, unless the applicant for admission has become the focus of a criminal investigation and has been taken into custody.** (Bold emphasis added.)

Barring an individual being the focus of a criminal investigation, applicants for admission do not have the right to legal representation. Thus, it is logical that CBP does not have extensive responsive documents concerning the subject; comprehensive CBP guidance

governing attorney representation and conduct, where in most instances applicants for admission have no such right, is unnecessary. That is, where there is no substantive right to representation in primary and secondary inspections, the agency need not provide detailed instructions or guidance regarding the subject – it is sufficient for CBP personnel to be informed that generally there is no right to counsel at the border.

In response to your appeal and contention that the search conducted in response to the initial request was inadequate, we contacted several offices within CBP in which responsive records could likely be found: the Office of the Border Patrol (OBP), the Office of Field Operations (OFO), and the Office of Chief Counsel (OCC). OBP is the organization within CBP responsible for preventing the entry of terrorists and terrorist weapons from entering the United States between official U.S. Customs and Border Protection ports of entry. OBP's traditional mission is to enforce immigration laws and to detect, interdict and apprehend those who attempt to illegally enter or smuggle people or contraband across U.S. borders between official ports of entry. OFO manages core CBP programs and operations at 20 Field Operations offices; 327 ports of entry; 15 preclearance stations in Canada, Ireland and the Caribbean; Immigration policy and programs; and Agricultural Quarantine Inspection (AQI) at all ports of entry in order to protect the health of U.S. plant and animal resources. OFO has primary operational responsibility for trade and passenger facilitation, interdiction and enforcement programs. OCC provides legal advice to, and legal representation of, CBP officers in matters relating to the activities and functions of CBP. OCC is also responsible for reviewing proposed actions to ensure compliance with legal requirements, preparing formal legal opinions, preparing or reviewing responses in all court actions, civil or criminal, involving CBP, and developing, implementing, and evaluating nationwide programs, policies, and procedures within its functional areas. Accordingly, these offices were determined to be the offices in which responsive records were likely to have been created and be maintained.

OFO provided information, some of which had been previously provided to you in response to the initial request by the FOIA Division, taken from the Inspector's Field Manual. OBP provided information from two of its manuals, the "Officers' Handbook" and "The Law of Arrest, Search and Seizure Manual". OCC reviewed the aforementioned documents, conducted a separate search, and confirmed that no other responsive records exist. We have appended copies of the responsive records to this letter and provided electronic copies on a disc as you requested.

Despite the searches and requests to components and offices within CBP, we have been unable to find responsive records beyond those identified above. We are unable to provide you with any further information because no such information exists.

If you have questions or concerns regarding this matter, please contact Andrew Langreich of my staff at (202) 325-0089.

In the event that you are dissatisfied with the disposition of your appeal, you may obtain judicial review of this decision pursuant to the provisions of 5 U.S.C. §

552(a)(4)(B) in the United States District Court in the district in which you reside, in the district where the agency records are situated, or in the United States District Court for the District of Columbia.

The Office of Government Information Services (OGIS) also mediates disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. If you are requesting access to your own records (which is considered a Privacy Act request), you should know that OGIS does not have the authority to handle requests made under the Privacy Act of 1974. If you wish to contact OGIS, you may email them at ogis@nara.gov or call 1-877-684-6448.

Sincerely,

A handwritten signature in cursive script, appearing to read "Shari Suzuki".

Shari Suzuki, Chief
FOIA Appeals, Policy & Litigation Branch

Attachments

Attachment B

U.S. Department of Homeland Security
Washington, DC 20536-5009



U.S. Immigration
and Customs
Enforcement

November 30, 2011

MICHAEL WISHNIE
JEROME N. FRANK LEGAL SERVICES
P.O. BOX 209090
NEW HAVEN, CT 06520-9090

Re: 2012FOIA2544

Dear Mr. Wishnie:

This acknowledges receipt of your Freedom of Information Act (FOIA) request to the U.S. Immigration and Customs Enforcement (ICE), dated November 29, 2011, and to your request for a waiver of all assessable FOIA fees. Your request was received in this office on November 29, 2011. Specifically, you requested All records related to CAP, as well as to the series INS and ICE programs out of which CAP developed, including the INS Alien Criminal Apprehension Program, INS Institutional Hearing Program, INS/ICE Institutional Removal Program, and ICE National Criminal Alien Removal Plan. .

Due to the increasing number of FOIA requests received by this office, we may encounter some delay in processing your request. Per Section 5.5(a) of the DHS FOIA regulations, 6 C.F.R. Part 5, the Department processes FOIA requests according to their order of receipt. Although DHS' goal is to respond within 20 business days of receipt of your request, the FOIA does permit a 10-day extension of this time period. As your request seeks numerous documents that will necessitate a thorough and wide-ranging search, DHS will invoke a 10-day extension for your request, as allowed by Title 5 U.S.C. § 552(a)(6)(B). If you care to narrow the scope of your request, please contact our office. We will make every effort to comply with your request in a timely manner; however, there are currently 1028 open requests ahead of yours.

As it relates to your fee waiver request, I have reviewed your letter thoroughly and have determined that you have not presented a convincing argument that you are entitled to a blanket waiver of fees.

The DHS FOIA Regulations, 6 CFR § 5.11(k)(2), set forth six factors to examine in determining whether the applicable legal standard for a fee waiver has been met. We will consider these factors in our evaluation of your request for a fee waiver:

- (1) Whether the subject of the requested records concerns "the operations or activities of the government;"
- (2) Whether the disclosure is "likely to contribute" to an understanding of government operations or activities;

- (3) Whether disclosure of the requested information will contribute to the understanding of the public at large, as opposed to the individual understanding of the requestor or a narrow segment of interested persons;
- (4) Whether the contribution to public understanding of government operations or activities will be "significant;"
- (5) Whether the requestor has a commercial interest that would be furthered by the requested disclosure; and
- (6) Whether the magnitude of any identified commercial interest to the requestor is sufficiently large in comparison with the public interest in disclosure, that disclosure is primarily in the commercial interest of the requestor.

As a requester, you bear the burden under the FOIA of showing that the fee waiver requirements have been met. Based on my review of your November 29, 2011 letter and for the reasons stated herein, I have determined that your fee waiver request is deficient because your request failed to meet factors 3 and 4,

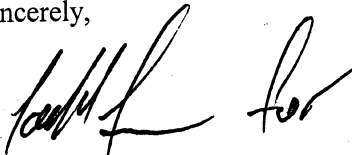
Since your request for a fee waiver has failed to satisfy each of the required factors, I am denying your fee waiver request.

Provisions of the Act allow us to recover part of the cost of complying with your request. We shall charge you for records in accordance with the DHS Interim FOIA regulations as they apply to non-commercial requestors. As a non-commercial requestor you will be charged 10-cents a page for duplication, although the first 100 pages are free, as are the first two hours of search time, after which you will pay the per quarter-hour rate (\$4.00, \$7.00, \$10.25) of the searcher. We will construe the submission of your request as an agreement to pay up to \$25.00. You will be contacted before any further fees are accrued.

You have the right to appeal the determination to deny your fee waiver request. Should you wish to do so, you must **send your appeal within 60 days of the date of this letter to:** Associate General Counsel (General Law), U.S. Department of Homeland Security, Washington, D.C. 20528, following the procedures outlined in Subpart A, Section 5.9, of the DHS Regulations. Your envelope and letter should be marked "Freedom of Information Act Appeal." The implementing Department regulations establish the criteria under which the FOIA is administered. Copies of the FOIA and regulations are available at www.DHS.gov.

Your request has been assigned reference number **2012FOIA2544**. Please refer to this identifier in any future correspondence. If you have any questions, or would like to discuss this matter, please feel free to contact this office at (202) 732-0600 or (866) 633-1182. Our mailing address is 500 12th Street, S.W., Stop 5009, Washington, D.C. 20536-5009.

Sincerely,

A handwritten signature in black ink, appearing to read 'Catrina M. Pavlik-Keenan', with a stylized flourish at the end.

Catrina M. Pavlik-Keenan
FOIA Officer

Attachment C

American Immigration Council, Immigration Policy Center
Publications, 2010
Available at <http://www.immigrationpolicy.org/research-publications>

Special Reports:

1. Reading the Morton Memo: Federal Priorities and Prosecutorial Discretion
2. Non-Citizens with Mental Disabilities
3. ICE'S Enforcement Priorities and the Factors that Undermine Them
4. An Assessment of DNA Testing for African Refugees
5. The New American Electorate (October 2010)
6. Giving Facts a Fighting Chance: Answers to the Toughest Immigration Questions
7. The DREAM Act: A Resource Page
8. Enforcing Arizona's SB 1070: A State of Confusion
9. Reforming America's Immigration Laws: A Woman's Struggle
10. DHS Progress Report: The Challenge of Reform
11. The Criminal Alien Program: Immigration Enforcement in Travis County, Texas
12. Many Happy Returns: Remittances and their Impact
13. Raising the Floor for American Workers
14. Immigration Problems and Solutions: A Resource Page

Fact Sheets:

15. Scholars United Behind DREAM Act
16. Secure Communities: A Resource Page
17. Dispelling DREAM Act Myths
18. The DREAM Act: Creating Economic Opportunities
19. The DREAM Act
20. How the United States Immigration System Works: A Fact Sheet
21. Refugees: A Fact Sheet
22. Chicken Little in the Voting Booth: The Non-Existent Problem of Non-Citizen "Voter Fraud"
23. The Economic and Political Impact of Immigration State by State: A Map
24. The Comprehensive Immigration Reform Act of 2010: A Summary
25. The DREAM Act: A Resource Page
26. Explaining the Recent Decline in Unauthorized Migration
27. Separating Fact from Fiction: The Truth about Kidnapping in Arizona
28. Immigrants in the U.S. Labor Force
29. Defending the Fourteenth Amendment: A Resource Page
30. The Economic and Political Impact of Immigrants, Latinos and Asians in all 50 States
31. The Impact of SB 1070: Usurping the Federal Government's Ability to Set Enforcement Priorities
32. New Americans in the Peace Garden State
33. New Americans in the First State
34. New Americans in the Mount Rushmore State

35. New Americans in Our Nation's Capital
36. IPC Responds to FAIR Report
37. New Americans in the Aloha State
38. New Americans in the Equality State
39. Strength in Diversity: The Economic and Political Clout of Immigrants, Latinos, and Asians
40. New Americans in the Bluegrass State
41. New Americans in the Beehive State
42. New Americans in the Mountain State
43. Immigrant Women in the United States: A Portrait of Demographic Diversity
44. New FBI Data Confirms Falling Crime Rates in Arizona
45. Ending Birthright Citizenship Would Not Stop Illegal Immigration
46. Not In Competition: Immigrants and Native-Born Workers
47. New Americans in the Ocean State
48. New Americans in the Constitution State
49. New Americans in the Magnolia State
50. Throwing Good Money After Bad: Immigration Enforcement
51. New Americans in the Beaver State
52. New Americans in the Sooner State
53. Arizona is Not the First State to Take Immigration Matters into their Own Hands
54. Real Enforcement with Practical Answers for Immigration Reform (REPAIR) Proposal Summary
55. Arizona's Punishment Doesn't Fit the Crime: Studies Show Decrease in Arizona Crime Rates
56. The Ones They Leave Behind: Deportation of Lawful Permanent Residents Harm U.S. Citizen Children
57. The Rise and Fall of the Secure Border Initiative's High-Tech Solution to Unauthorized Immigration
58. The Fiscal Bottom Line on Immigration Reform
59. New Americans in the Land of Enchantment
60. Local Enforcement of Immigration Laws Through the 287(g) Program
61. New Americans in the Granite State
62. New Americans in the Green Mountain State
63. New Americans in the Treasure State
64. New Americans in the Gem State
65. New Americans in the Evergreen State
66. New Americans in the Show Me State
67. The 2010 Census: The Stakes of an Accurate Count
68. How Expanding E-Verify Would Hurt American Workers and Business
69. Protecting Children in the Aftermath of Immigration Raids
70. The Criminal Alien Program: Immigration Enforcement in Prisons and Jails
71. Immigration Detainers: A Comprehensive Look
72. New Americans in the Last Frontier
73. Remittance Will Be Critical to Haitians; The U.S. Benefits from Remittances As Well

74. New Data on Federal Court Prosecutions Reveal Non-Violent Immigration Prosecutions Up
75. Future Flow: Repairing Our Broken Immigration System
76. Granting Refuge: Temporary Protected Status (TPS) for Haitians in the United States
77. New Americans in the Bay State
78. New Americans in the Lone Star State
79. Family Immigration: Repairing our Broken Immigration System
80. The Economic Benefits of Immigration Reform
81. Immigration Problems and Solutions: A Resource Page

Attachment D

Government Accountability Office Reports about the Criminal Alien Program, Predecessors to the Criminal Alien Program, and/or Enforcement Against Criminal Aliens Generally

1. GAO-11-187, Criminal Alien Statistics—Information on Incarcerations, Arrests, and Costs (April 21, 2011)
2. GAO-05-337R, Homeland Security—Information on Criminal Aliens Incarcerated in Federal and State Prisons and Local Jails (May 9, 2005)
3. T-GGD-99-47, Criminal Aliens—INS' Efforts to Identify and Remove Imprisoned Aliens Continue to Need Improvement (Feb 25, 1999)
4. GGD-99-3, Criminal Aliens--INS' Efforts to Remove Imprisoned Aliens Continue to Need Improvement (October 16, 1998)
5. T-GGD-97-154, Criminal Aliens—INS' Efforts to Identify and Remove Imprisoned Aliens Need To Be Improved (July 15, 1997)
6. AIMD-95-147, Law Enforcement Support Center—Name-Based Systems Limit Ability to Identify Arrested Aliens (August 21, 1995)
7. GGD-90-79, Criminal Aliens—Prison Deportation Hearings Include Opportunities to Contest Deportation (May 25, 1990)
8. T-GGD-90-6, Criminal Aliens—INS Enforcement (November 1, 1989)
9. GGD-88-3, Criminal Aliens—INS' Enforcement Activities (November 19, 1987)
10. GGD-87-41BR, Criminal Aliens—Majority Deported from the New York City Area Not Listed in INS' Information Systems (March 17, 1987)
11. GGD-87-19BR, Criminal Aliens—INS' Detention and Deportation Activities in the New York City Area (January 15, 1987)
12. GGD-86-58BR, Criminal Aliens—INS' Investigative Efforts in the New York City Area (March 25, 1986)